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No. 85-1277

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

THE SCHOOL BOARD OF NASSAU COUNTY; and  
CRAIG MARSH, Individually and as Superintendent  
of Schools of Nassau County, FL,

*Petitioners*

v.

GENE H. ARLINE,

*Respondent*

On Appeal from the United States Court  
of Appeals for the Eleventh Circuit

**BRIEF OF AMICUS CURIAE**  
**CONGRESSMEN WILLIAM E. DANNEMEYER,**  
**ROBERT K. DORNAN, EARL HUTTO, HELEN BENTLEY,**  
**JIM HANSEN, LARRY CRAIG, JOE BARTON**  
**AND SENATOR JESSE HELMS**

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### QUESTIONS PRESENTED

1. Whether an individual with a contagious disease should be protected by the Rehabilitation Act of 1973.
2. Whether a ruling by this Court affirming the lower court decision would result in granting affirmative action rights to a category of persons unintended by Congress.

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INTERESTS OF *AMICUS CURIAE*

Congressman William Dannemeyer et al. appear before this Court as amici curiae with the written consent of Respondent, Gene H. Arline, and Petitioners, the School Board of Nassau County, Florida and Craig Marsh. The written consent of all parties to this suit is contained in letters which have been filed with the Clerk of this Court.

Congressmen William Dannemeyer et al. are United States Representatives. Senator Jesse Helms is a United States Senator.

Each of the Congressional amici has exercised his legislative prerogative on various legislative matters concerning federal issues since the time he was elected. The movant Congressional amici seek to act as friends of the court in the instant case because it raises vital and substantial issues of federal law.

Amici can bring to this case a perspective not adequately represented by the other parties. Whereas the Respondent is primarily concerned with retaining employment and the Petitioner is primarily concerned with protecting the health and welfare of pupils and teachers in Nassau County which may be threatened by the presence of an employee with tuberculosis, amici are aware of the broader picture.

In the instant case, amici urge this court to overturn the decision of the Eleventh Circuit and to find that individuals with tuberculosis and other contagious diseases are not protected by the anti-discrimination provisions of the Rehabilitation Act of 1973. Amici believe that a ruling by this Court affirming the Eleventh Circuit decision would pose a threat of unprecedented magnitude and a result clearly unintended by Congress in its enactment of the Rehabilitation Act of 1973 and in amendments to that Act in 1978.

#### STATEMENT OF THE CASE

Amici adopt the recitation of facts contained in the brief for the Petitioner, Nassau County School Board, in the interest of judicial economy.

#### SUMMARY OF ARGUMENT

Amici submit that the United States Court of Appeals for the Eleventh Circuit erroneously held that tuberculosis is a "handicap" within the meaning of 29 U.S.C.

706(7)(B) and that persons with that disease are protected by the anti-discrimination provisions of The Rehabilitation Act of 1973. 29 U.S.C. 793 and 794.

Amici further submit that neither the statute on its face nor the legislative history of The Rehabilitation Act of 1973 supports the premise that persons with contagious disease should receive the full benefits and protections of the law intended for "handicapped" persons.

Finally, amici contend that the ramifications of a decision affirming the holding of the Eleventh Circuit would be far-reaching and would result in consequences unintended by Congress.

#### ARGUMENT

##### I. AN INDIVIDUAL WITH A CONTAGIOUS DISEASE IS NOT PROTECTED BY THE ANTI-DISCRIMINATION PROVISIONS OF THE REHABILITATION ACT OF 1973.

###### A. The statute on its face and through subsequent interpretation precludes the inclusion of an individual with a contagious disease within the Act's protection.

The Rehabilitation Act of 1973 proscribes discrimination against handicapped individuals in programs or activities which receive federal funds or in programs conducted by the federal government. To obtain the protection of the Rehabilitation Act of 1973, an individual must satisfy five conditions of the Act: First, the individual must be "handicapped." 29 U.S.C. 706(7)(B) [hereinafter Section 706(7)(B)]. Second, the individual must be "otherwise qualified." Third, the individual must be denied the benefits of, or be subjected to discrimination under a covered program or activity. Fourth, the individual must be discriminated against "solely by reason of his handicap". Fifth, the discrimination must occur in a program receiving federal monies or in one conducted by a government agency. 29 U.S.C. 794. See



*Prewitt v. U.S. Postal Service*, 622 F.2d 292 (5th Cir. 1981). Because the issue before this Court is whether an individual with a contagious disease should receive the protections mandated by the Act, this brief will address only the first two elements of the statute.

**1. An individual with a contagious disease is not "handicapped".**

It is clear that an individual who has contracted a contagious disease does not fall squarely within the Act's definition of "handicapped". The Act defines a "handicapped individual" as one who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a history of such impairment, or (3) is regarded as having such an impairment. Section 706(7)(B). Because an individual who has contracted a contagious disease is not always limited in one or more major life activities, these individuals should not be included within the definition of "handicapped".

The Act does not clarify the meaning of this definition but regulations promulgated pursuant to this Act narrowly define each element.

The regulations state that "physical or mental impairment" is:

(A) any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive; digestive; genito-urinary, hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. 45 C.F.R. 84.3(j)(2)(i) (1985).

Similarly, an individual who "has a record of such impairment" is defined as a person who has "a history of,

or has been classified [or misclassified] as having a mental or physical impairment that substantially limits one or more major life activities."

45 C.F.R. 84.3(j)(2)(iii) (1985).

A person who "is regarded as having an impairment" must have:

(A) a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (B) is substantially limited in major life activities only as a result of the attitude of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by the recipient as having such an impairment.

45 C.F.R. 84.3(j)(2)(iv) (1985).

Lower courts have examined the meaning of the term "handicapped" and have found that various conditions fall within its definition. *Holly v. City of Naperville*, 603 F. Supp. 220 (N.D. Ill. 1985) (blindness in one eye is a handicap); *Bento v. ITO Corporation of Rhode Island*, 599 F. Supp. 731 (D.R.I. 1984) (heart condition can be a handicap); *Fitzgerald v. Green Area Education Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984); (cerebral palsy, nocturnal epilepsy and dyslexia are handicaps). The Fifth Circuit has defined "impairment" as "diminution in quality, value, excellence or strength." *De la Torres vx. Bolger*, 781 F.2d 1134, 1137 (5th Cir. 1986).

Amici do not disagree that respondent suffers an "impairment". As found by the lower court, her tuberculosis did affect her respiratory system. Respondent does not allege, however, that it is this impairment that constitutes her handicap and prevents her from working. To the contrary, respondent implies that she is physically capable of teaching. It is the contagious nature of the disease which prevents her from working, not the physical nature of the impairment. Therefore, respondent can-



not be classified as "handicapped" because her impairment does not limit a "major life activity". Section 706(7)(B).

This Court should find that a contagious disease does not meet the definition of "handicapped". Section 706(7)(B). An individual with a contagious disease must show that the disease causes some identifiable physical impairment exclusive of communicability. To include persons with contagious diseases within the definition of "handicapped" would expand the meaning beyond the plain language of the statute and regulations promulgated pursuant thereto. An individual who has contracted a contagious disease does not always experience sufficient "impairment" to limit major life activities. See "Memorandum from Charles J. Cooper, Assistant Attorney General, Office of the Legal Counsel for Ronald E. Robertson, General Counsel, Department of Health and Human Services", at 19 (June 20, 1986). With some contagious diseases, the victim may carry the virus but never experience a "diminution in quality, value, excellence or strength", and thus never experience "impairment". See *De La Torres v. Bolger*, 781 F.2d 1134, 1137 (5th Cir. 1986). Consequently, an individual with a contagious disease does not fall within the Act's definition of "handicapped".

**2. An individual with a contagious disease is not "otherwise qualified."**

To receive the protections of the Act, an individual must be "otherwise qualified" without requiring unreasonable accommodation at the workplace or in the program.

In 1979, this Court was asked to determine the meaning of "otherwise qualified" in a case involving a nursing school which refused to admit a deaf applicant to the nursing program. *Southeastern Community College v. Davis*, 442 U.S. 397 (1976). In that case, the Court stated that the protections of the Rehabilitation Act applied only to those handicapped persons "who are able to meet all of a program's requirements in spite of his

handicap." *Id.* at 406. Because the plaintiff's deafness prevented her from safely performing in both her training program and in her proposed profession, the court held that the plaintiff was not protected by the Rehabilitation Act.

Subsequent lower court decisions have followed closely the precedent set in *Southeastern Community College*. In *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981), the court was asked to determine whether the U.S. Postal Service violated the Rehabilitation Act by refusing to employ a physically impaired applicant as a distribution clerk. The court described the ultimate test as whether, with or without reasonable accommodation, a handicapped individual who meets all employment standards except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." *Id.* at 310.

A minimum requirement of most programs or occupations is the ability to work with others in close proximity without endangering their health or safety. Physically and mentally impaired individuals pose a threat on the job only if they are unable to adequately perform assigned tasks. In contrast, an individual with a contagious disease jeopardizes the health and safety of others merely by being present and sharing workspace. Therefore, an individual who has contracted a contagious disease cannot "meet all of a program's requirements in spite of his handicap" because the infectious nature of the disease is, itself, the threat. *Id.* at 406.

In accommodating the "otherwise qualified individual" the recipient is required to "make reasonable accommodation for the known physical or mental limitations of a qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its pro-

gram." 45 C.F.R. 84.12(a) (1985). In a recent Eighth Circuit case, the court held that the Rehabilitation Act does not contemplate that an employer receiving federal funds will launch major restructuring of projects and facilities regardless of cost. *Gardner v. Morris*, 752 F.2d 1971 (8th Cir. 1985). These cases serve as strong precedent for this court to find that Petitioner does not fall within the protection of the Rehabilitation Act.

The apparent thrust of the statutes, the regulations and case law is to compensate individuals for their handicap by building ramps, by acquiring hearing and sight learning aids and by providing reasonable accommodations which allow otherwise qualified individuals to become productive members of society. They do not require a recipient of federal funds, such as an employer, to launch major restructuring of projects and facilities regardless of cost. For an employer to accommodate an employee who carries a contagious disease, it may be necessary to isolate the employee from susceptible co-workers or clients. In some cases, the employer may be forced to engage in major safety efforts such as constructing glass barriers, wearing protective garments and utilizing video instruction techniques to ensure the separation of healthy and infected employees. In consumer-oriented industries, it may even require the employer to assume substantial losses in business and/or goodwill.

Because accommodation would be unreasonable and costly, an individual with a contagious disease should not receive the protections of the Rehabilitation Act of 1973.

**B. The legislative history of the Rehabilitation Act does not contemplate the inclusion of persons with contagious diseases within the anti-discrimination protections of the Rehabilitation Act.**

The lack of reference to contagious diseases in the legislative history of the Rehabilitation Act is conspicuous by its absence. S. 318, 93 Cong., 2d Sess., reprinted in 1973 U.S. Cong. & Ad. News 2076, 2094; S. Conf. Rep.

391, 93 Cong., 2d Sess. reprinted in 1973 U.S. Cong. & Ad. News 2143, 2145; H.R. Rep. 244, 93 Cong., 2d Sess. 7 (1972); H.R. Rep. 1149, 95 Cong., 2d Sess., reprinted in U.S. Cong. & Ad. News 7312, 7333 (1978); H. Conf. Rep. 1780, 95 Cong., 2d Sess., reprinted in U.S. Cong. & Ad. News 7375, 7413; S. Rep. 890, 95 Cong., 2d Sess. (1977). Contrary to the view of the Court below, *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985),<sup>1</sup> Congress did not choose to exclude alcoholics and drug abusers and therefore, by implication, include contagious diseases. Neither the House nor the Senate ever contemplated including contagious diseases. By amending the Rehabilitation Act in 1978, Congress was specifically reacting to a 1977 Attorney General's Opinion which held that alcoholics and drug abusers were "handicapped individuals" within the meaning of the Act. 43 Op. Att'y Gen. 12 (1977).

The Senate expressed its strong concern about the need to retain health and safety protections. During the Floor debate on the 1978 amendment to exclude drug and alcohol abusers from the definition of "handicapped", Senator Cannon specified the need for this clarifying amendment by citing regulations and rulings of the Department of Labor and the Department of Health, Education, and Welfare which had the effect of "compelling airlines and other companies holding Federal Government contracts to actively recruit and employ alcoholics and drug addicts . . . without regard to the character or sensitivity of the work involved." 124 Cong. Rec. S.

<sup>1</sup> Circuit Judge Vance concluded that "there is no . . . legislative direction . . . Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded. To the extent that the statute and regulations express any intent to limit the scope of Section 504, Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them." *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985).



30322 (daily ed. September 20, 1978). In support of the amendment, Cannon stated that such a blanket policy could potentially affect public confidence in the "safety and reliability" of air transportation. *Id.* at 30322. The Senate adopted his amendment by voice vote.

The House of Representatives was concerned about public health and safety as well. Throughout the legislative history of Section 504 of the Rehabilitation Act, the need to preserve public "safety" was hailed as a public policy goal of paramount importance. In his statement before the Subcommittee on Select Education, concerning his amendment to exclude drug abusers and alcoholics, Congressman Henry Hyde discussed the necessity of protecting public safety. Rehabilitation Act of 1973: Oversight Hearings on Amendments Before the Select Subcomm. on Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. (1978).

"The Congress needs to give thoughtful and wide-ranging consideration to the needs of the handicapped person, balanced against the realities of public safety, economics and commonsense." *Id.* at 502. In that same statement, Congressman Hyde posed a number of rhetorical questions aimed at emphasizing the absurdity of applying affirmative action provisions to drug abusers and alcoholics:

What will OSHA inspectors say about the safety of a plant where unrehabilitated drug addicts and alcoholics are working? Are schools which receive federal funds now mandated to seek such persons out for employment? Will mass transit systems be required to accept such applicants as bus drivers and motormen? How does an employer determine whether an applicant can really function adequately and for a sustained period of time?

*Id.* at 502

The same concerns which prompted Senator Cannon and Congressman Hyde to formulate this amendment are tantamount to consideration of defining contagious diseases as a "handicap" under Section 706(7)(B). An

employer's decision to hire an individual with an airborne contagious disease, such as tuberculosis, represents a decision to knowingly expose other employees and clientele to the threat of infection. See Bennett & Searl, COMMUNICABLE DISEASE HANDBOOK, at 228-252 (1982). Although in some cases communicable diseases are not easily transmitted in the workplace, thereby alleviating the threat of infection, they still raise issues of longevity, continuity and reliability in the workplace. *Id.* at 167-203.<sup>2</sup>

<sup>2</sup> Benenson, Abram S., CONTROL OF COMMUNICABLE DISEASES IN MAN, (14th ed. printing 1985). The modes of transmission and symptoms illustrate the divergent characteristics which must be considered when a victim of contagious disease is present in the workplace.

*Tuberculosis* is transmitted in "airborne droplet nuclei" from sputum of infectious persons. *Id.* at 411. Susceptibility is general and the period of communicability is as long as infectious tubercle bacilli are being discharged in the sputum. *Id.* at 412. Tuberculosis symptoms which may decrease occupational efficiency include fatigue, weight loss, cough, chest pain, hemoptysis, hoarseness, and involvement of lymph nodes, pleura, pericardium, kidneys, bones and joints, larynx, skin, intestines, peritoneum or eyes. *Id.* at 410.

*Acquired Immune Deficiency Syndrome*. (AIDS) is primarily transmitted from person to person through sexual contact, sharing unclean needles, or through the transfer of blood or blood products. The crude case fatality rate is 46%, increasing with the duration since diagnosis. *Id.* at 3. Symptoms which may decrease work productivity include lymphadenopathy, anorexia, chronic diarrhea, weight loss, fever, and fatigue progressing until an opportunistic disease develops. Alternatively patients may present with a severe, life-threatening opportunistic disease such as pneumocystis carinii pneumonia, chronic enteric cryptosporidiosis, disseminated strongyloidiasis, toxoplasmosis of the CNS or disseminated atypical mycobacteriosis, pulmonary or gastrointestinal or CNS cytomegalovirus infection, chronic ulcerative mucocutaneous or disseminated herpes simplex infection, progressive multifocal leukoencephalopathy, Kaposi's sarcoma and primary lymphoma limited to the brain. *Id.* at 3.

*Syphilis* is transmitted by direct contact with infectious exudates from moist early lesions of skin and mucous membrane, body fluids and secretions (saliva, semen, blood, vaginal discharges) of

By their nature, persons with contagious diseases, drug abusers and alcoholics require different treatment than those with impairments traditionally associated with the term "handicapped". For example, the loss of an arm may not affect an individual's ability to manage an office, ensure the health and safety of coworkers, or affect an employee's longevity of service or reliability of attendance. In contrast, a person with an airborne communicable disease, such as tuberculosis, may unwittingly infect other employees and clients merely by his presence in the workplace. Similarly, while a sexually transmitted disease, such as Acquired Immune Deficiency Syndrome [hereinafter AIDS], may or may not pose an immediate threat to coworkers,<sup>3</sup> it certainly affects the reliability and lon-

infected persons during sexual contact. *Id.* at 377. Susceptibility is universal although only 10% of exposures result in infection. The period of communicability is variable and indefinite. Death or serious disability does not occur during early stages. Late manifestations shorten life, impair health and "limit occupational efficiency."

<sup>3</sup> While AIDS is transmitted primarily by sexual contact and through blood or blood products, Harvard research professor William Haseltine reports that "anyone who tells you categorically that AIDS is not contracted by saliva is not telling you the truth . . . There are sure to be cases . . . of proved transmission through casual contact. Dershowitz, *EMPHASIZE SCIENTIFIC INFORMATION*, N.Y. Times, at A27, col. 2 (Mar. 18, 1986). See also Grutsch & Robertson, *THE COMING OF AIDS*, AM. SPECTATOR, at 13, n.2 (Mar. 1986). In addition, the possibility of other transmission routes is implicated by scientific experiment which found that infectious cell-free virus could be recovered from dried material up to three days later if kept at room temperature. In an aqueous environment, infectious virus survived longer than 15 days at room temperature (23 to 27 degrees) and 11 days at 36-37 degree temperatures. Even under the more rigorous heating conditions commonly used to inactivate organisms, infectious virus was detected after three hours of exposure. L. Resnick, M.D. et al. *Stability and Inactivation of HTLV-III/LAV Under Clinical and Laboratory Environment*, THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, (April 11, 1986). This data indicates that the virus is not as fragile as once claimed and theoretically could be transmitted by saliva. See McKeever, *THE AIDS NEWSLETTER* (June 1986).

gevity of the infected individual and affects his ability to "function adequately and for a sustained period of time."<sup>4</sup>

Congress never intended to include individuals with contagious diseases within the anti-discrimination and affirmative action provisions of the Act. When Congress amended this Act in 1978, they specifically excluded "drug abusers and alcoholics" from the affirmative action provisions of the Act when this category of individuals threaten the "property or safety of others". Section 706(7)(B). Had Congress ever contemplated applying this Act to individuals with contagious diseases, they undoubtedly would have extended the 1978 exclusion to such individuals when they threaten the "safety of others".

<sup>4</sup> AIDS is 100% fatal. See *NIH Conference—The Acquired Immunodeficiency Syndrome: An Update*, 102 ANNALS OF INTERNAL MEDICINE, 802 (1985) ("No patient who has unequivocal acquired immunodeficiency syndrome has yet been cured.") *Council Report: The Acquired Immunodeficiency Syndrome*, 252 JAMA 2037, at 2041 (1984). ("At present, there are no cases of AIDS in which the immune system has been reported to have recovered. Thus far, most patients with AIDS have eventually succumbed.") AIDS is manifested in such symptoms as persistent weight loss, intermittent fever, chronic diarrhoea, generalized lymphadenopathy, progressive encephalopathy, military tuberculosis, malaria bacterial pneumonia, and a variety of lethal opportunistic infections including a cytopathic effect on the brain. Searle, John, 78 JOURNAL OF THE ROYAL SCIENCE OF MEDICINE, 613 (August 1985).

A recent study of Danish homosexuals concluded that "most" persons infected with HTLV-III [AIDS] will develop AIDS or some measurable immunologic defect or clinical abnormality. Drs. Melbye, Biggar, Ebbesen, Neuland, Goedert, Faber, Lorenzen, Skinhoj & Gallo, "Long-Term Seropositivity for Human T-Lymphotropic Virus Type III in Homosexual Men Without the Acquired Immunodeficiency Syndrome: Development of Immunologic and Clinical Abnormalities, *Annals of Internal Medicine*, Volume 104, April (1986). This study indicates that almost all persons who are antibody positive but do not exhibit clinical symptoms of AIDS will develop AIDS or some measureable defect. Robertson, A.D.J., *The Virulence of AIDS*, THE WALL STREET JOURNAL at 33, col. 1 (October 31, 1985). The implication then is that any person who tests antibody positive will be significantly affected and ultimately job performance will suffer.



Therefore, despite the absence of any direct reference to contagious diseases in the legislative history of Section 504 of the Rehabilitation Act, the intent to preserve and prioritize safety and to refrain from overburdening the employer was clearly evident in both the House and Senate proceedings.

**C. Historically, an individual with a contagious disease has been treated differently than an individual with a handicap.**

Historically, individuals with contagious diseases have been quarantined and isolated.<sup>5</sup> In contrast persons with

<sup>5</sup> See 4 Blackstone, W., COMMENTARIES ON THE LAW OF ENGLAND at 161-162 (1769). By statute, local officials could order infected persons to remain in their houses. Violation of a quarantine order was considered a felony. In 1794, Congress enacted a law in response to the outbreaks of yellow fever in New York and Philadelphia which permitted them to convene as needed in case of "prevalence of contagious sickness". Williams, Dr. R.C., THE UNITED STATES PUBLIC HEALTH SERVICE 1798-1950, at 68 (1984). Current authority authorizes the Surgeon General to make and enforce regulations necessary to prevent the introduction, transmission or spread of communicable diseases from foreign countries to the U.S. or from state to state. 42 U.S.C. 264 (1944).

Pursuant to these statutes, broad authority was delegated by Congress to the Surgeon General and the Secretary of the Treasury to restrict or quarantine all vessels or vehicles coming from any foreign port or country where any contagious disease *may* exist. 20 Op. Atty. Gen. 468 (1892). Under a March 27, 1890 Act entitled "An Act to Prevent the Introduction of Contagious Diseases From One State to Another, and for Punishment of Certain Offenses", the Secretary of the Treasury was authorized by the President to take steps to prevent the spread of cholera, yellow fever, smallpox or plague. 22 Op. Att'y. Gen. 106 (1898).

Specific historical incidents of quarantine include:

In Venice during the Middle Ages, persons suspected of having bubonic plague were required to spend 40 days in open air and sunlight and any who had contact with them were isolated. R.C.

physical or mental handicaps, while maintaining essential freedoms, have been relegated to unproductive societal roles. Even today, this distinction exists. Persons with contagious diseases, or those who abuse alcohol or drugs, are legally excluded from this country under our Immigration laws. 8 U.S.C. 1182(a)(5) (1952), 8 U.S.C. 1182(a) (1961). Current law bars immigrants with communicable diseases such as 'chancroid, gonorrhea, infectious leprosy, active tuberculosis, syphilis, lymphogranuloma, venereum and granuloma inguinale' from entering the U.S. 14 C.F.R. 34 (1986). The federal government has proposed that AIDS be added to this list. *Id.* Persons with physical defects, however, are only excluded if the "disability is determined to be of such a nature that it may affect the ability of the alien to earn a living." 8 U.S.C. 1182(a)(7) (1952).

The apparent irony of a decision in favor of Respondent cannot be overlooked. Should this Court find that persons with a contagious disease are to be considered "handicapped", this Court will essentially grant affirmative action rights to individuals currently barred from the U.S. Such a decision would create a contradiction in the law. The federal law would, on the one hand, exclude

Williams, M.D. *The United States Public Health Service 1798-1950*, p. 63.

In 1710, England passed a rigorous quarantine Act and foreign ships from Cyprus, where plague was prevalent, were burned. *Id.* at 65.

—In 1866, Congress enacted a joint resolution to quarantine as necessary and proper to guard against the introduction of cholera. *Id.* at 68.

—In 1909 absolute quarantine for 3 months was imposed on all members of families affected by polio. In 1916, the northeastern part of the U.S. suffered one of the most devastating epidemics of polio and drastic quarantine restrictions were imposed. Paul, John R., M.D., A HISTORY OF POLIOMYELITIS, at 148-149 (1971).

aliens, students and tourists with contagious diseases, from entering this country, while on the other, require federal agencies and parties receiving federal dollars to take affirmative action to hire individuals with these same diseases.

**II. THE RAMIFICATIONS OF A DECISION TO INCLUDE PERSONS WITH CONTAGIOUS DISEASES WITHIN THE PROTECTIONS OF THE REHABILITATION ACT WOULD BE FAR-REACHING AND HAVE CONSEQUENCES UNINTENDED BY CONGRESS.**

**A. Issues raised by the legislative history of the Rehabilitation Act apply to consideration of an individual with a contagious disease.**

There are currently 229 diseases considered "contagious" by the Centers for Disease Control. Benenson, Abram S., *CONTROL OF CONTAGIOUS DISEASES IN MAN*, 14th Edition, 2nd Printing, 1985. Diseases in this category range from airborne diseases, such as tuberculosis to venereal diseases such as syphilis and AIDS. *Id.* A decision by this Court to include contagious diseases within the definition of "handicapped" for purposes of anti-discrimination protections under the law would reach countless victims of disease unintended by Congress.

In amending the Rehabilitation Act in 1978, Congress considered the far-reaching implications of extending the Act to include drug addicts and alcoholics. During a hearing before the House Subcommittee on Select Education of the Committee on Education and Labor, Congressman Henry Hyde questioned the wisdom of even this small expansion of the law. Oversight Hearings on the Rehabilitation Act of 1973. 95th Congress, 2d. Sess., 1978, at 502. Not only would this extension forbid recipients of federal funds "from unfairly excluding handicapped individuals, but it would also require positive steps to give handicapped citizens meaningful equality of

opportunity in employment health, education and social service programs." *Id.* at 502. Congressman Hyde then postulated the effects of the expansion: "Are schools which receive federal funds now mandated to seek such persons out for employment? Will the Federal Reserve System, Federal Deposit Insurance Corporation and the Treasury Department have its quotas, or goals if you prefer, of such employees? *Id.* at 502.

While Congressman Hyde was merely hypothesizing about extending the law to include drug abusers and alcoholics, expanding the law to include persons with contagious disease would pose even more serious questions of public policy. For example, in the case of AIDS, 64 million persons could fall within this expanded definition of "handicapped" within the next 3 years and therefore would be subject to the anti-discrimination protections in Section 504 of the Rehabilitation Act. M. Melbye, M.D., et al. *Long Term Seropositivity for Human T-Lymphotropic Virus Type III in Homosexual Men Without the Acquired Immunodeficiency Syndrome: Development of Immunologic and Clinical Abnormalities*, 104 *ANNALS OF INTERNAL MEDICINE* (April 1986). Although no hearings have been held on the consequences of an expansion of the law, commonsense should tell us that this interpretation could be seriously counterproductive to industry, government, education and the handicapped themselves.

Further conjecture by Congressman Hyde serves to illustrate the potential impact of an expanded definition:

If an employer may not inquire of a prospective employee about his or her handicap . . . , nor even require a physical examination, how can an effective determination be made as to the applicant's ability to perform job-related functions? Blind interviews and hiring practices should be of great interest to insurance companies [dealing in] both liability and workmen's compensation carriers. I think we can predict a quantum leap in insurance premiums to be



reflected in the added costs being passed on to the consumer.

*Id.* at 503. These same issues are raised when one considers including an individual with a contagious disease in the definition of "handicapped."

The potential ramifications of this Court's decision are already being felt in a number of States in an albeit narrow context. The communicable disease, AIDS, has been the subject of state law and court decisions purporting to protect victims of AIDS as legally handicapped.<sup>6</sup> The fatal nature of the disease and, as yet, undiscovered routes of transmission pose a potential, though undefined, danger.<sup>7</sup> Because tuberculosis poses a well-established

<sup>6</sup> The Los Angeles City Council adopted an ordinance which prohibits discrimination against victims of AIDS. Merina, *Bradley Signs Landmark AIDS Measure*, THE LOS ANGELES TIMES at A1, col. 1, (August 17, 1985). The State of Wisconsin adopted an ordinance which bans discrimination against victims of AIDS. The Florida Commission on Human Relations ruled in January, 1986 that the Broward County Government illegally discriminated against a man with AIDS when it fired him. The Commission held that AIDS is a "physical handicap" and therefore AIDS victims are protected by Florida law prohibiting employment discrimination. Walter, D., *Florida Man Wins AIDS Discrimination Appeal*, THE ADVOCATE at 17, col. 1 (January 21, 1986); A Virginia patent draftsman with AIDS is suing the D.C. employer who fired him based on a Virginia law protecting disabled persons from discrimination. Engel, *Alexandria Firm Sued Over Firing AIDS Victim*, THE WASHINGTON POST at B1, col. b (February 14, 1986); A Virginia doctor is suing Fairfax City health clinic for discrimination based on a Virginia law which prohibits discrimination against the disabled. Specter, M., *Va. Doctor With AIDS Sues Clinic Over Firing*, THE WASHINGTON POST at D4, col. 1 (April 10, 1986).

<sup>7</sup> At present, approximately 14,000 persons have developed AIDS and it is expected that about two million people are now infected and will remain infectious until they die. In addition if the disease develops at the same rate, as is expected, the number infected will double every year. Robertson, A.D.J., *The Virulence of AIDS*, THE WALL STREET JOURNAL at 33, col. 1 (October 31, 1985). Thus in five years in the U.S. alone 448,000 people will have AIDS and

threat to public health, the case at bar poses an even more compelling case for excluding individuals with contagious disease from the Act's protection. See footnote 3.

**B. This Unprecedented Expansion of the Law Should be the Subject of In-Depth Congressional Consideration.**

Congress created this ambiguity in the law and careful exploration of legislative intent is needed to clarify it. The problems are complex and varied and need pervasive study before this Court mandates a solution which could be far worse than the problem. For this reason, Congressman Dannemeyer has introduced H.R. 5111, legislation which would exclude individuals with contagious disease from the definition of "handicapped" for purposes of the anti-discrimination and affirmative action provisions of the Rehabilitation Act.<sup>8</sup>

die within 2 to 3 years. 64 million people will be permanently infected within three years and will develop AIDS or some measurable defect. M. Melbye, M.D., et al. *Long Term Seropositivity for Human T-Lymphotropic Virus Type III in Homosexual Men Without Acquired Immunodeficiency Syndrome: Development of Immunologic and Clinical Abnormalities*, 104 ANNALS OF INTERNAL MEDICINE (April 1986). An expansion of "handicapped" to include contagious diseases would then include 64 million people within the anti-discrimination protections of The Rehabilitation Act. 29 U.S.C. 793, 794 (1973). In many cases, victims of contagious diseases, such as AIDS, syphilis and gonorrhea, contracted the disease through volitional acts whereas persons associated with traditional handicaps acquired their disabilities at birth or through subsequent causes through no fault of their own.

At present there are no known cases of transmission by saliva or air but there is a growing consensus among some doctors that AIDS may be passed by kissing, mouth-to-mouth resuscitation and sharing of glasses or toothbrushes. See McKeever, THE AIDS NEWSLETTER (June 1986).

<sup>8</sup> Congressman Dannemeyer introduced H.R. 5111, legislation to amend the definitional section of the Rehabilitation Act of 1973 to exclude persons with contagious diseases from the definition of "handicapped". The legislation was introduced on June 26, 1986 on

The Congress needs to give thoughtful and wide-ranging consideration to the needs of handicapped persons balanced against the realities of public safety and commonsense. Great numbers of truly handicapped individuals have suffered cruel and needless discrimination. The elimination of that discrimination and the attainment of equal opportunity employment based on reasonable accommodation is a worthy goal; disregard for public safety is not. This Court has an obligation to assess all ramifications of a decision to bring individuals with contagious disease under the protections of the Act. Ultimately, this Court must decide whether to permit Congress to clarify its intent on this crucial issue or to engage in judicial activism and thereby open the floodgates of litigation to countless claims of discrimination where none are merited.

#### CONCLUSION

For the foregoing reasons, amicus submits that this Court should strike down the Eleventh Circuit decision and find that victims of contagious disease are not within the protections of the Rehabilitation Act of 1973.

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behalf of himself and Congressmen Dornan, Siljander, Bentley, Smith and Craig. Section 706(7)(B) of the Rehabilitation Act was amended in 1978 to exclude drug addicts and alcoholics.